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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

MOTION FILED

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No. 81

RECTOR SIMMONS, JR. and ROSE SIMMONS,

Appellants,

—v.—

THE HOUSING AUTHORITY OF WEST HAVEN, CONNECTICUT,

Appellee.

ON APPEAL FROM THE APPELLATE DIVISION
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THE STATE OF GEORGIA, *et al.*,

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ON APPEAL FROM THE GEORGIA STATE SUPREME COURT

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE CENTER ON SOCIAL WELFARE POLICY AND LAW, THE NATIONAL HOUSING LAW PROJECT AND COMMUNITY ACTION FOR LEGAL SERVICES, INC.

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No. 265

GLADYS BODDIE, BERTHA BARKER, ANN DE NICOLA, MARYANN DOZIER, BETTY ANN PEREZ, CATHERINE STRAIN, MARRY WIERZBICKI, MAMIE WILLIAMS, MARY YEATON, and all other persons similarly situated,

Appellants,

—v.—

THE STATE OF CONNECTICUT; EDWARD HOROWITZ, Clerk of the Superior Court of Connecticut for New Haven County; JUDGE JOSEPH S. LONGO, Superior Court of Connecticut; JUSTICE JOHN P. COTTER, Court Administrator, Supreme Court of Connecticut,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

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—v.—

THE STATE OF GEORGIA; THE HOUSING AUTHORITY OF THE CITY OF ATLANTA, and HARRY R. CHANCE,

Appellees.

ON APPEAL FROM THE GEORGIA STATE SUPREME COURT

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND STATEMENT OF INTEREST OF THE *AMICI*

Movants Center on Social Welfare Policy and Law, National Housing Law Project and Community Action for Legal Services, Inc., respectfully move the Court for permission to file the attached brief *amici curiae* for the following reasons. The reasons assigned also disclose the interest of the *amici*.

(1) The Center on Social Welfare Policy and Law is the specialized law reform resource of the Legal Services Program of the Office of Economic Opportunity. Affiliated with the School of Law of Columbia University, the Center undertakes research pertaining to the legal rights of the poor, particularly as to public assistance and other government benefit programs, and supports other OEO-funded legal services programs through education and assistance in the preparation of important litigation. The Center also maintains the nation's only comprehensive private collection of state public assistance regulations and manuals.

(2) The Center has concerned itself with many basic legal issues affecting poor persons, involving public assistance, housing, and food and agricultural programs. In working with lawyers serving the poor on these and many other issues, the Center has become acutely aware of the very basic procedural problems faced by poor persons before they are able to assert their substantive legal rights. Among these problems are the financial barriers imposed by just such statutes as are at issue in the three cases considered herein.

(3) The National Housing Law Project was instituted by the Office of Economic Opportunity in recognition of the marked increase in legal service activities in the housing and urban law area. The Project provides specialists' services to neighborhood legal service lawyers and performs independent activities in the areas of private landlord-tenant relations, urban renewal, sponsorship of low-income housing production, and other matters relating to housing and urban affairs. The Project maintains extensive resources of information in all of these areas.

(4) The handicaps faced by the low-income tenant in eviction proceedings are of particular concern to the Project and the offices it serves. Chief among these is the necessity to post bond at various stages of an eviction proceeding, a requirement which inhibits both the assertion of private rights and the creation of meaningful new protections for all tenants.

(5) Both the Center and the National Housing Law Project provide services to the approximately 265 Legal Services Projects in the United States, which are staffed by

more than 1800 attorneys. These attorneys advise and represent approximately 500,000 low-income clients annually. The *amici* believe that all legal service lawyers are severely handicapped in their ability to serve their clients by financial barriers to judicial proceedings. Therefore they have a vital interest in presenting to this Court the full range of issues raised by this case.

(6) Community Action for Legal Services, Inc. ("CALS") is the central coordinating corporation for ten other corporations which provide free legal services to the indigent in the twenty-six designated poverty areas of New York City. CALS is a special community action program funded by the United States Office of Economic Opportunity under the provisions of Section 222(a) (3) of the Economic Opportunity Act, 42 U. S. C. §2809 (a) (3) (1967). Permission for CALS to practice law pursuant to Section 495(5) of the Judiciary Law was granted by the Appellate Division, First Department, on October 10, 1967.

(7) As the entity charged with the primary responsibility for providing free legal services to residents of the poor neighborhoods of New York City, CALS has an obvious and immediate interest in legal issues affecting the indigent. Since, as will be subsequently demonstrated, the instant cases present significant questions relating to the right of access to the courts by poor persons in order to vindicate statutorily granted rights and remedies, CALS respectfully seeks the permission of this Court to intervene as *amicus curiae* in support of appellant's motion for leave to appeal herein.

(8) Counsel for all appellants have consented to the filing of a brief *amici curiae* by the movants. Counsel for appellees have not consented.

Wherefore, movants pray that the attached brief *amici curiae* be permitted to be filed with the Court.

Respectfully submitted,

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BRIEF *AMICI CURIAE*

Statement of the Cases

***Sanks* v. *Georgia*, No. 266.**

Appellants are tenants in a publicly owned housing development in Atlanta, Georgia. They received a notice of eviction for nonpayment of rent based on an affidavit filed with the court by their landlord. Under Georgia Code Ann. §§ 61-301 and 302 such an affidavit is sufficient to bring about the issuance of a dispossessory warrant ordering the Sheriff or Marshal to evict the tenant and his possessions. The tenants sought to raise several defenses to the eviction by filing a counter affidavit and obtaining a trial on the facts at issue.

In order to file such an affidavit, Georgia Code Ann. §61-304 requires that the tenant "tender a bond with good security payable to the landlord, for the payment of such

sum, with costs, as may be recovered against him on the trial of the case." The amount of the bond normally includes *twice* the amount of rent due and owing when the tenant vacates the premises, which amount the tenant may be subject to pay should he be found to have unlawfully stayed over. The amount of the bond is typically based upon six months to one year's rent, thereby requiring a total sum of as much as twice one year's rent plus costs.

Tenants were unable to afford the costs of the required security bond, for which they would have had to post full collateral. They were consequently foreclosed under the Georgia statutes from any hearing whatever of their defenses to the attempted eviction and were rendered vulnerable to summary eviction. No similar bonds, obligations or restrictions are placed upon landlords.

The Fulton County, Georgia, Civil Court, held that the summary eviction procedures herein at issue are violative of plaintiffs' constitutional rights under the Equal Protection and Due Process clauses of the United States and Georgia Constitutions as well as the Access to the Courts clause of the Georgia Constitution. Georgia Civil Court, Fulton County, Warrant Nos. 63610, 69418 and 66636 (October 2, 1968). This decision was reversed by the Georgia Supreme Court. *State of Georgia* v. *Sanks*, Nos. 603, 604 (January 23, 1969). In a companion case, the same court held that requiring the double rent judgment was not violative of either Equal Protection or Due Process. *Meltzer* v. *C. Buck LeCraw and Co.*, Georgia Supreme Court No. 605 (January 23, 1969).

***Simmons* v. *West Haven Housing Authority*, No. 81.**

Appellants were tenants in a public housing development run by the West Haven Housing Authority. As in *Sanks*, they were the subject of summary eviction proceedings. They raised several special defenses in the Connecticut trial court, but that court ruled against them, making no mention of those special defenses. Tenants' attempted appeal was frustrated by the Connecticut statutory requirement that a bond be posted with surety to secure the landlord for all rent which may become due during the pendency of the appeal before a tenant in possession may appeal. Conn. General Stat. § 52-542. Lacking full collateral for the amount of the required bond (approximately $432 for six months' rent) tenants were unable to appeal the merits of their claim. Tenants then requested leave to pay rent monthly into court in lieu of a full bond during the pendency of the appeal. The trial court refused their request and ordered immediate eviction.

The Connecticut Circuit Court, Appellate Division, dismissed plaintiffs' appeal of the trial Court's refusal to waive the bond requirement and held the requirement constitutional. *Simmons* v. *West Haven Housing Authority*, File No. CV 8-677-5985 AP (March 7, 1968). Certification for review by the Supreme Court of Connecticut was denied (June 25, 1968). Tenants have deposited $360 with the Connecticut Circuit Court, as rent for the five months during which they remained in possession after the judgment of eviction. This money has not been returned to plaintiffs and will be used to secure the Housing Authority's claim for rent owed during the *Simmons* tenancy should plaintiffs' appeal be allowed to proceed without bond.

***Boddie* v. *Connecticut*, No. 265.**

Appellants are recipients of public assistance who desire to file for divorce in the Connecticut state courts. They are unable to tender the necessary fees for filing and service of process which, in such actions, range from $55 to $195.[1] Since appellants receive only a bare subsistence allowance, all of which must be used for food, shelter and personal needs, they will never be able to put aside the sum required for divorce in Connecticut. They are therefore prohibited from remarrying and from establishing a self-supporting family unit for themselves or their dependent children, solely because of their poverty. Appellants seek reversal of a three-judge federal district court decision upholding the constitutionality of the Connecticut practices. *Boddie* v. *Connecticut*, 286 F. Supp. 968 (D. Conn. 1968).

Introduction and Summary of Argument

Amici adopt the unusual course of submitting a single brief in the *Boddie*, *Sanks* and *Simmons* cases because of their conviction that these cases present a single fundamental issue: namely, whether a court of the United States may determine issues of crucial importance to the involved individuals—shelter and marital status—while denying these individuals a hearing because of their poverty.

Amici's basic contention is that a United States court may not constitutionally refuse to adjudicate a person's marital status, nor deprive a person of his home because

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[1] Forty-five dollars to court as filing fee; $10 to $15 to sheriff for personal service; or $100 to $150 to a newspaper for service by publication.

that person is too poor to afford the statutorily imposed costs of justice. This position is, in our view, a necessary corollary of the most fundamental precepts of American constitutional democracy. At the very core of our own image of ourselves as a free people is the notion of limited government, which means, above all, a government that is permitted to exert its coercive force only in accordance with law. Central to such limitation in the use of force, to limited government, to freedom itself, is access to the courts, which in the United States have been uniquely charged with ultimate responsibility for ensuring that the coercive powers of government are exerted lawfully and for protecting individual liberties by so limiting the use of coercive force. *Boddie, Sanks* and *Simmons* present this issue in its most elemental form, seeking, on the one hand, a full and fair hearing of their claim that their landlord's attempt to evict them from their dwellings is unlawful and, on the other, an adjudication of marital status upon which the possibilities of future marital associations, of reconstructed family life, of freedom from the coercion of cruelly irrelevant criminal sanctions all depend.

So fundamental are appellants' claims to the institutions upon which our traditions of limited government and freedom are founded that they can be articulated in terms of a number of particular, traditionally recognized constitutional doctrines.

Equal Protection

The practices challenged herein are unconstitutional first because they deny the individuals involved the equal protection of the laws guaranteed to all persons by the Fourteenth Amendment. They deny them equal protection be-

cause they deprive them of the opportunity to plead their case for a reason which bears no rational relation to their just entitlement to a hearing.

Moreover, one deals here not with arbitrary and unreasoning caprice, but with something much worse, more clearly offensive to equal protection. One deals with a practice which, whether by design or inadvertence, imposes a distinctively harsh and restrictive regime upon the poor, a practice which denies the poor alone the power to protect their homes and reorder their shattered marital destinies. Because the practices challenged involved a discrimination based upon indigence, they, like other classifications based on status—race, nationality, religion, illegitimacy—must fall unless the state can produce a compelling justification which can be served by no less offensive means.

Finally, one deals here with matters traditionally recognized as being peculiarly within judicial competence: access to the courts, access to resolution of issues of central significance to the persons involved: shelter and marital status. Where matters of such character are involved, the courts have long and appropriately applied the most stringent standards in assessing proffered justifications. By such standards, the practices challenged herein must fall.

Due Process

No person may be deprived of life, liberty or property without due process of law. Of the various particular requirements which courts have over the years distilled from this most basic of our constitutional protections, the most central is the notion that the government may not apply its coercive powers against an individual without first per-

mitting the individual a hearing. Reduced to its simplest terms, appellants here seek no more than a full and fair hearing before the coercive powers of the state are applied to destroy a home and perpetuate a marital status which time long ago rendered a fiction.

First Amendment

The practices challenged herein also involve grave implications for First Amendment freedoms, rendered applicable to the states through the Fourteenth Amendment. The results reached below deny appellants their constitutionally guaranteed right to petition the government for the redress of grievances. The right to petition the government for the redress of grievances includes access to the judiciary. Foreclosing such access because of a person's indigence is not a reasonable regulation of access to the courts. Particularly are such practices unreasonable burdens on the right to petition the government where access to the courts is sought for the urgent purpose of defending one's home or securing adjudication of marital status.

The family is an association within the protections accorded associations by the First and Fourteenth Amendments. The refusal to permit appellant a resolution of her marital status denies her the freedom to form a new family, immures her in a marital status which has no reality, and exposes her to criminal sanctions should she seek to establish a new family. Appellant is denied her freedom of association not because she does not meet the substantive standards required by the state but because she is too poor to purchase access to the courts. To deny a person freedom of marital association because of her indigence is to impose an impermissible burden on freedoms guaranteed by the First and Fourteenth Amendments.

ARGUMENT

I.

The Equal Protection clause prohibits states from denying Court access to poor persons seeking to protect their homes or adjudicate their marital status.

The Equal Protection clause of the Fourteenth Amendment imposes on all state action the minimal requirement that distinctions in the implementation of public policy bear some rational relation to the objectives of that policy. Amici contend that the practices involved in *Boddie*, *Sanks*, and *Simmons* fail to meet even this minimal requirement because these practices bar persons from access to State Courts for a reason—their poverty—which bears no rational relationship to the primary purpose served by such access. See, *inter alia*, *Gulf, Colorado & Western Ry.* v. *Ellis*, 165 U. S. 150 (1897); *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886); *Carrington* v. *Rash*, 380 U. S. 89 (1965).

There can be no doubt that the charges imposed by the States of Georgia and Connecticut effectively bar the poor from such access. The tenants' evidence of their inability to post the required bond in *Sanks* was uncontradicted; in *Simmons*, the Connecticut courts did not dispute that the charges would bar appellants from an appeal; in *Boddie*, Judge Smith, dealing with a motion to dismiss, clearly assumes that "these plaintiffs are effectively barred from bringing suit by the filing fee and other costs." 286 F. Supp. 968, 972. The showing of incapacity made by appellants below is characteristic of the problem which confronts the poor. The base amount of the bond required in the *Sanks* and *Simmons* cases typically ranges from six months' to one year's rent. In Georgia, moreover, prevail-

ing practice normally requires that bond be posted for twice the rent potentially owing to ensure payment of the double-rent penalty. In *Boddie*, the practices challenged typically require payments ranging between $50 and $200. That payments of such amounts are beyond the reach of the poor should require no elaborate demonstration. Particularly is this clear in the case of welfare recipients, such as some of the appellants, whose only source of support is carefully calculated to make saving impossible and is, moreover, reduced to exhaust any significant receipts or savings which may perchance occur. Moreover, it cannot be said that the resources of the expanding legal services programs avoid such preclusion by making the needed resources available. *See* the Appendix hereto for Amici's collection of information on this point.

It would therefore be inaccurate and misleading to conceive of the practices here involved simply as charges or taxes. It is of crucial importance never to lose sight of the fact that from the standpoint of foreclosing judicial access, there is no difference between the practices challenged and an outright ban on paupers. Put most simply, the issue is whether a State may *bar* the poor from its courts in summary eviction and divorce proceedings.

Foreclosing the poor from judicial access while affording it to the affluent creates a distinction which bears no rational relationship to the purposes which the judiciary serves in eviction and divorce proceedings. In an eviction proceeding, the court sits to determine who is lawfully entitled to possession of real estate, to adjudicate conflicting claims to dominion over property. It is in relation to this primary purpose that any denial of access, and the distinctions which such denial imports, must first be judged. When so evaluated, the essential irrationality of

the Connecticut and Georgia practices clearly emerges. Can it be said that this purpose provides any basis for justifying distinctions based on poverty and affluence? Can it be said that the poor as a class are not in need of such access? Like others, indeed with greater frequency, the poor are tenants in this world, and as these cases testify, the poor are often in need of protection against their landlord's predations. Can it be said that a man's poverty is grounds for assuming that his defense to an eviction will lack merit? To ask these questions is to answer them, and more importantly, to reveal that there exists no rational relationship which would justify the exclusion of the poor from access to the judiciary in summary eviction proceedings.

In divorce proceedings, the court sits to determine whether the facts of a particular domestic situation meet the criteria which the state has established to govern the dissolution of marital unions, and to perform the subsidiary tasks of reconstituting the financial and, where there are children, the custodial basis of the future family. The State has, of course, a critical interest in the formation, stability and dissolution of families, an interest as parens patria which entails a greater measure of state involvement. However, neither this greater involvement nor the purposes which the judiciary serves in divorce proceedings provides any basis for excluding the poor as a class from courts in the adjudication of marital status. Indeed, the marital and family problems of the poor have gained wide recognition as one of our major contemporary social crises. One cannot say that because a woman is poor, she will have no need of judicial access in marital proceedings. One cannot say that because she is poor, her grounds for divorce will be frivolous. As in eviction proceedings, ex-

clusion of the poor from the courts bears no rational relationship to the purposes for which such access is generally afforded.

Amici's first point is then that when one clearly perceives the true nature of the practices challenged: exclusion of the poor from the courts; and couples this perception with an accurate articulation of the primary purposes served by court access in eviction and divorce proceedings, the essential irrationality of these practices becomes clearly apparent. Lacking any rational relationship to these primary purposes, the practices challenged herein fail of the minimal requirements of the equal protection clause for any government action and must accordingly be condemned as unconstitutional.

Appellants in *Sanks* and *Simmons* are denied equal protection not only because they are denied judicial access which is afforded to the affluent community but also because they are subjected to burdens not visited upon the adversary landlords. Though tenants must post bond to protect landlords against damages resulting from their defense of an eviction proceeding, no comparable obligation is imposed upon landlords to secure tenants against the potentially much more serious damages eventuating from a wrongful eviction. Such disparate treatment of adversaries to a lawsuit is flagrantly inconsistent with the duty of even-handed treatment of litigants which has been part of the equal protection clause since its earliest days. Thus in *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S. 150 (1897), this Court condemned state legislation which permitted plaintiffs against railroad companies to obtain costs and punitive damages while denying correlative rights to

defendants. See also *Chicago, St. Louis Ry. v. Moss*, 60 Miss. 641 (1882), where classic statement is made of this governing principle:

> "All litigants, whether plaintiff or defendant should be regarded with equal favor by the law, and before the tribunals for administering it, and should have the same right to appeal with others similarly situated." 60 Miss. at 646-7.

A. *Classifications Based on Poverty Contravene Equal Protection Unless Justified by Some Compelling State Interest.*

The standard which must be met in justifying a distinction utilized in the implementation of public policy is not uniform for all cases. The degree of latitude which this Court has allowed state legislatures in drawing such distinctions has varied with the circumstances involved. See, *inter alia*, *Skinner v. Oklahoma*, 316 U. S. 535 (1942); *McLaughlin v. Florida*, 379 U. S. 184 (1964); *United States v. Carolene Products Co.*, 304 U. S. 144 (1938). It could hardly be otherwise. The importance of the private interests affected, judged both in terms of personal impact on the individuals involved and of constitutionally recognized values; the relative competence constitutionally assigned to the legislature and the judiciary over the matter in question; the character of the classification—all legitimately affect the stringency with which a court will examine proffered justifications. Amici contend that all these factors require that respondents in this case demonstrate not a mere rational relationship between distinction and purpose, but a compelling state interest which makes the distinction necessary for the attainment of critical state ends.

A compelling justification is required first because the classification here employed is one based on poverty, a factor which—like race, nationality and religion—is peculiarly offensive to our notion of equal protection because it burdens an individual because of his status. It deprives a person not because of what he has done, but because of what he is, and in so doing it denies him the right as a man to be treated as any other man. The practices herein challenged deny that a poor man is as good as any other man; they assume that he is not worthy of that hearing which his affluent brothers are accorded as a matter of right.

The particularly objectionable quality of classifications based on poverty has long been recognized by our courts. A state may not exclude persons from its boundaries because of their indigence, *Edwards* v. *California*, 314 U. S. 160 (1941); nor may it seek to deter the entry of indigents by denying public assistance, *Shapiro* v. *Thompson*, —— U. S. ——, 89 S. Ct. 1322 (1969); nor may it exclude the poor from its elections by burdening the franchise with taxes, *Harper* v. *Virginia Board of Elections*, 383 U. S. 663 (1966). Similarly, a state may not bar indigents from taking criminal appeals by requiring them to provide transcripts which are beyond their means, *Griffin* v. *Illinois*, 351 U. S. 12 (1956), *Draper* v. *Washington*, 372 U. S. 487 (1963); or by charging appellate docket and filing fees, *Burns* v. *Ohio*, 360 U. S. 252 (1959); nor may a state impose charges which preclude indigents from filing habeas corpus petitions, *Smith* v. *Bennett*, 365 U. S. 708 (1961).

The attitude taken toward classifications based on poverty by the judiciary of this country is perhaps best sum-

marized in Justice Jackson's concurring opinion in *Edwards* v. *California, supra*:

> "We should say now, and in no uncertain terms, that a man's mere property status, without more, cannot be used by a state to test, qualify, or limit his rights as a citizen of the United States. 'Indigence' in itself is neither a source of rights nor a basis for denying them. The mere state of being without funds is a neutral fact—constitutionally an irrelevance, like race, creed or color." 314 U. S. at 184-5.

To exclude a person from access to the courts because of his poverty is to make use of a classification traditionally subject to the most searching appraisal by our courts. Where such exclusion bears no relation to the primary purpose served by such access, there can be no justification for it, let alone the compelling state interest which must be demonstrated to save it.

B. *Access to the State Courts in Eviction and Divorce Proceedings Is a Right of Fundamental Importance Which May Not Be Denied to the Poor Unless Justified by a Compelling State Interest.*

Demonstration of a compelling state interest in the practices challenged herein is also required because of the critical importance of court access to the persons involved and to the institutions established by our constitution. Where matters of smaller significance are involved, a lesser degree of justification may pass muster in defense of a distinction. But here we are concerned with one of the most fundamental of American constitutional rights. As this Court put the point in *Chambers* v. *Baltimore & Ohio R.R.*, 207 U. S. 142, 148 (1907):

> "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship."

Indeed, so fundamental is the right of access to the courts that it has long received constitutional protection wholly apart from the equal protection clause. Of importance to our constitutional system equal to that of equal protection is the right not to be deprived of life, liberty or property except by due process of law. Central to the concept of due process is the right to a hearing. It is no more than this that appellants in the *Sanks* and *Boddie* cases seek. Distinctions foreclosing to some a right which itself receives the independent protection of the due process clause can be accepted only if they are clearly justified by some compelling state interest, and as Amici have sought to demonstrate above, the distinctions here challenged are justified by no such interest.

Access to our judicial institutions is protected by the due process clause and the First Amendment because of the courts' critical role in maintaining our constitutional system and the liberties which that system protects. It is, as was said in the *Chambers* case above, a right which is conservative of all others. The right to possession of premises to which a tenant may be lawfully entitled, the right to form a new family cannot be effectively protected without the opportunity to be heard. Moreover, without such an opportunity, other rights may be sacrificed. An eviction may, under certain circumstances, constitute a punishment for exercise of the rights of free speech, free press or free

association. See, *inter alia, Edwards* v. *Habib*, 397 F. 2d 687 (1968). To ensure that such rights are conserved, access must be afforded.

In this respect, the cases here involved raise somewhat the same issue as that adjudicated by the Court in *Harper* v. *Virginia Board of Elections, supra,* where a Virginia poll tax was declared violative of the equal protection clause. Just as the Court there sought to protect the poor's access to the legislature by protecting their franchise, so here the court is asked to protect the poor's access to the courts. Indeed, in some respects, *Boddie, Sanks* and *Simmons* present a situation even more demanding of protection, for while the financial burden imposed by the Virginia poll tax was nominal, there can be no doubt that the charges here attacked are absolutely preclusive for the poor. Further, the right protected in *Harper,* the poor's right to the franchise, lacks the explicit constitutional recognition given the right to a hearing by the due process clause.

Access to state courts in divorce and eviction proceedings is critical not only because of the role which such access plays in our constitutional system; it is critical also because of its importance to the individual in purely personal terms. One need not elaborate on the significance to a man of the right to defend his own home; of the civil wrongs which could be perpetrated against an individual, few rise to the seriousness of the unlawful deprivation of his shelter. Similarly, the right to adjudication of marital status is the necessary prerequisite to remarriage and the reconstitution of shattered family destinies. Eloquent is the testimony of knowledgeable individuals of the hardship and disgrace enforced upon women in this country who, abandoned by their husbands and offered the opportunity of remarriage,

are barred by their poverty from securing judicial dissolution of marriages which have for years been fictions.

The character of the right involved in this case calls for the closest scrutiny not only because of its personal and constitutional significance but also because it is a right affecting the operation of the courts, an area in which this Court has long exercised distinctively far-reaching powers of review. These powers have been exercised in rightful recognition of the special competence with which the constitution endows the courts where matters of judicial access and operation are involved. Whatever deference may be accorded the legislature in dealing with matters such as economic regulation, legislative determinations affecting the operations of courts have always been much more a matter for judicial regulation. The extraordinary competence of the court in judicial matters has been reflected in numerous doctrinal developments, perhaps most notably in the development of safeguards in criminal proceedings over the past decades.

Included in this body of development are the *Griffin*, *Draper*, *Burns* and *Bennett* cases dealing with various aspects of the relationship between indigence and equal protection in the judicial process. The motivating spirit behind these cases is perhaps best summarized in the *Griffin* case where it is said:

> "There can be no equal justice when the kind of trial a man gets depends on the amount of money he has." 351 U. S. at 19.

Equal justice, equal protection of the laws was in those cases applied to ensure that an indigent defendant is not deprived of an appeal, of a transcript for appeal, or of an

opportunity to petition for a writ of habeas corpus. It is of course true that those cases involved criminal proceedings whereas we here speak of civil actions in divorce and eviction proceedings, but there is nothing in *Griffin* and its progeny which confine the doctrines there accepted to criminal cases. We speak here not of rights granted under the Sixth Amendment which pertain to criminal prosecutions exclusively. We speak of the equal protection of the laws which applies alike to civil and criminal causes. Moreover, appellants here seek not some recondite procedural privilege. The appellants in the *Sanks* and *Boddie* cases seek that most fundamental rudiment of due process, a hearing. Whatever doubts one may have about construing the equal protection clause to require that a state provide the poor with legal resources of a more marginal importance to the proper functioning of a judicial process, surely there should be none where what is involved is the bare right to a hearing in matters of critical importance to the individual.

C. *There Is No Justification for the Practices Challenged Herein.*

Thus, Amici contend that the practices challenged herein must be deemed violative of our basic guarantee of equal protection unless it can be shown that they serve some state interest of overriding importance. Amici have already attempted to demonstrate that exclusion of the poor from access to the courts bears no rational relation to the primary purpose served by such access. It remains to consider whether there is any secondary purpose whose service would warrant the foreclosure of indigent litigants. Three such ancillary purposes are commonly advanced in justification. First, it is said in cases of the *Sanks* and *Simmons* variety, that bonds are required to protect the

financial interest of the evicting landlord during the pendency of the eviction proceeding. Of this purported justification, many things may be said. First, there is the question of whether the state may adopt a mode of assuring the landlord's pecuniary interest which forecloses defense of the action. Even were there no other means of securing the landlord's rental interest, there would be substantial doubt as to the validity of any mechanism which assured one party's interests *pendente lite* at the cost of precluding any defense at all by the adverse party. But the ultimate unacceptability of such a defense is made plain by the existence of alternative mechanisms which would secure the landlord's financial interests without precluding the tenants' defense. The landlord's rental interest is adequately served by the requirement that rental payments currently owing be paid to a court-appointed receiver. Such a scheme would protect the landlord while allowing the tenant his day in court.

Also commonly proffered are the somewhat different justifications to the effect that the fees are necessary to deter frivolous litigation and that they are necessary for revenue raising purposes. Turning to the latter justification, one notes first that the fees involved support but a small fraction of the costs of adjudicating marital status in Connecticut and that the revenue raised thereby constitutes an insignificantly small fraction of Connecticut's revenues. This latter fact makes it abundantly clear that it is wholly misleading to speak of the "necessity" of state financing through the imposition of such charges. The State of Connecticut has before it an infinite and bewildering variety of possible levies (none of which are pleasant to the payer, to be sure) to finance its expenditure. Most

of the major revenue-producing alternatives, such as the income tax and the sales tax, do not entail precluding the poor from the exercise of basic civil liberties. The statement that the levies herein challenged are "necessary" means only that the State of Connecticut has chosen to raise revenue in a way which precludes certain poor persons from instituting divorce actions when it could have as easily chosen a tax structure which did not entail such preclusive consequences.

Finally, it is said that the imposition of charges precludes the bringing of frivolous suits which will be brought in the absence of such charges. Passing the unrealistically misanthropic view which underlies such a justification, it should be noted that, whatever the validity of such a justification in other circumstances, it is strikingly inapposite to the matters at hand. In *Sanks* and *Simmons*, we are concerned with tenants *defending* eviction proceedings, rather than with the initiation of litigation. The floodgates are unlikely to be opened by litigants whose very presence in court is a response to an unwelcome offensive by their landlords. Similarly, matrimonial litigation is not often undertaken in a spirit of unrestrained frivolity. As the American Bar Foundation put the point in its investigation of such problems:

> "Some court proceedings, although in the form of litigation, are really not resolutions of disputes, but mere legal formalizations of arrangements worked out between parties nominally in legal conflict with each other. This is true of default matrimonial proceedings—divorce, annulment, separation—and, with certain qualifications, adoptions, 'no asset' bankruptcies, and perhaps certain other proceedings. In this type of case

> the public policy of deterring litigation (by imposing costs and fees as a condition of access to the courts) either does not apply at all, or at most, it applies in much weaker form. Yet costs are involved in such proceedings as in other judicial proceedings, and with similar differential deterrent effects on the poor as compared to others. The result is that a person of means may be able to obtain a legal formalization that a poor man cannot. This discrimination cannot be justified by the public policy of deterring litigation.". "Public Provision for Costs and Expenses of Civil Litigation," Report of the American Bar Foundation, June, 1966, pp. 10-11.

Moreover, whatever the merits of such charges in deterring frivolous litigation, ultimately no system which precludes one-seventh of a nation from access to the courts can be justified as deterrence to occasional frivolity.

This conclusion—that no justification exists for practices which deprive the poor of court access—was recognized in the context of a divorce proceeding by the New York Supreme Court in *Jeffrys v. Jeffrys*, 58 Misc. 2d 1045 (N. Y. Sup. Ct., Kings Co., 1968). There the court found the imposition of preclusively expensive publication costs on the poor a violation of the Equal Protection clause, stating at 1056:

> "Marriage is clearly marked with the public interest. In this state, a marriage cannot be dissolved except by 'due judicial proceedings' (N.Y. Constitution, art. I sec. 9). We have erected by statute a money hurdle to such dissolution by requiring in many circumstances the service of a summons by publication . . . This hurdle is an effective barrier to Mrs. Jeffrys' access

to the courts. The loss of access to the courts in an action for divorce is a right of substantial magnitude when only through the courts may redress or relief be obtained. Such a right is, it seems to me, as basic as Griffin's right to appeal and Mrs. Harper's right to vote. It is manifestly discriminatory under *Griffin* standards to deprive Mrs. Jeffrys of that right while affording it to others with money."

For the very same reasons, because of a similar lack of justification, Amici urge that the charges imposed in *Boddie* must fall.

D. *Conclusion of Equal Protection Argument.*

In sum, Amici's position is that the practices challenged herein contravene the equal protection clause of the Fourteenth Amendment because: (i) they bear no rational relation to the primary purposes underlying the creation of court access in eviction and marital proceedings; (ii) they constitute classifications based on poverty, traditionally suspect in this country; (iii) they deprive individuals of a basic civil right; and (iv) there are no ancillary purposes which can justify such practices.

In light of the above, Amici contend that the bond required in *Sauks* and *Simmons* and the charges imposed in *Boddie* constitute invidious discriminations violative of the equal protection clause.

To decide otherwise would render that noble engraving above this Court's pillars a mocking palimpsest wherein the discerning eye could see, beneath what is visible to all, the more revealing inscription: "No paupers allowed."

II.

Requiring court fees or costs of an indigent litigant as a condition to asserting his rights before a court of law deprives him of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

A. *The Right to a Hearing Before a Court of Law Cannot Be Made Dependent on the Ability to Pay Certain Fees or Costs.*

Appellants herein have all been deprived at various points in the litigative process of an opportunity to present their claims before a judicial tribunal. As a result they have been deprived of certain elements of property and liberty without the most basic requisite of due process of law—notice and an opportunity for a hearing. *Schroeder v. New York*, 371 U. S. 208 (1962); *Covey v. Somers*, 351 U. S. 141 (1956); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950); *Morgan v. United States*, 304 U. S. 1 (1938); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U. S. 673 (1930); *Coe v. Armour Fertilizer Works*, 237 U. S. 413 (1915).

In its most literal sense, the right to due process means the right to a hearing. *Hovey v. Elliot*, 167 U. S. 409, 413-14 (1897). If one cannot appear and present evidence and argument in his defense, the chances that he will be dealt with fairly are minimal. Without such safeguards as are provided by a trial which comports with due process, a citizen can be deprived of those things most dear to him through a secretive, farcical proceeding, or without any proceeding at all. (*See, e.g., Thompson v. City of Louisville*, 362 U. S. 199 (1960).)

At a minimum we know that due process mandates some sort of hearing at some time before the taking of life, liberty or property. *Coe v. Armour Fertilizer Works, supra.* Further, notice and hearing must be "aimed at establishing the validity, or at least the probable validity, of [a person's] underlying claim *before* he can be deprived of his property or its unrestricted use." *Sniadach v. Family Finance Corp.*, —— U. S. ——, 89 Sup. Ct. 1820, 1823 (1969). (Emphasis original.)[2]

The hearing must be "fair" and appropriate to the type of proceedings and the individual case.

> "[By] due process is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained, and it must give them an opportunity to be heard respecting the justice of the judgment sought. Hagar v. Reclamation District, 111 U. S. 701, 708."
>
> *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 161-62 (1951). (Frankfurter, J., concurring.)

Furthermore, and this is crucial to the cases at bar, that opportunity must be real. *Brinkerhoff-Faris Trust & Sav-*

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[2] *Sniadach* invalidated Wisconsin's pre-judgment garnishment statute, under which a summons for the seizure of a defendant debtor's wages was issued by a court based solely on the statements of the creditor's attorney. Any subsequently withheld wages could be regained after a later trial on the merits. The court held that the interim deprivation of wages imposed "tremendous hardship" and could not be imposed without a prior hearing. The requirement is even more imperative when the loss is not temporary, as in *Sniadach*, but permanent and total deprivation of one's dwelling and the pain and suffering caused a family suddenly evicted from its living quarters.

ings Co. v. *Hill*, 281 U. S. 673, 682 (1930). See also *Mullane* v. *Central Hanover Trust Co.*, 339 U. S. 306 (1950), and *Covey* v. *Somers*, 351 U. S. 141 (1956). A nominal opportunity to pursue one's rights can never satisfy the due process clause. And a hearing is nominal when, no matter how just its procedures, one is barred from it by a financial requirement he cannot fulfill. A right which is conditioned upon a circumstance a party cannot meet is in effect no right at all. "Constitutional rights would be of little value if they could be . . . indirectly denied, *Smith* v. *Allwright*, 321 U. S. 649, 664 (1944) . . . or manipulated out of existence." *Harman* v. *Forssenius*, 380 U. S. 528, 540 (1965). See also *Western Union Tele. Co.* v. *Kansas*, 216 U. S. 1 (1909); and *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943). And particularly invidious are those conditions which are based upon race or class, factors which are fixed beyond the ability of the individual to alter. *Morey* v. *Doud*, 354 U. S. 457 (1957).

As one commentator has written about the very statute at issue in *Sanks* v. *Georgia*:

> "There can be no question that the statute does provide for a hearing on the merits. In this sense, it might be said that a tenant need only avail himself of the opportunity that is provided. But it accomplishes nothing to tell a poor man that he would have an opportunity to defend if he had money. Such an opportunity is meaningless to him. He no more has a practical opportunity to be heard than does a defendant who is not given adequate notice."
>
> Klevens, "Poverty and Equal Access to the Courts: the Constitutionality of Summary Dispossess in Georgia." 20 Stanford L. Rev. 766, 772 (1968).

The Georgia requirement of posting bond in order to defend an action is, in effect, a requirement that the indigent tenant fulfill an impossible condition before he will be afforded his fundamental right to be heard. Since the indigent tenant cannot afford to post the bond, he is being deprived of his absolute right to a trial as guaranteed by the due process clause of the Fourteenth Amendment. The impact of this requirement is made shockingly clear when one considers that only thirteen tenants took advantage of their "opportunity to be heard" in response to 19,000 eviction notices issued in Fulton County, Georgia in 1967. (Opinion below in No. 266, Georgia Civil Court, Fulton County, October 2, 1968.)

Under the Georgia procedure, it is possible and even likely that poor tenants will be evicted without good cause. Suppose a tenant with a month-to-month or year lease diligently pays his rent on time. A landlord may want a tenant to vacate before his lease is up because he wants the building for a higher paying commercial tenant, because he just bought the building and does not want tenants of certain race or religion, or because he has a personal grudge against the tenant, perhaps for reporting a housing code violation. See *Edwards v. Habib*, 397 F. 2d 687 (1968). Knowing that the tenant has no means of providing the required bond, the landlord can file a complaint for eviction and falsely allege that the tenant has failed to pay rent. The tenant who has paid the rent and has receipts to prove it, nevertheless will be evicted, for without the money to provide the bond he cannot demonstrate his innocence at a hearing. As the tenant has no procedural rights, he also has no substantive rights, in spite of what the law may have led him to believe.

Equally in *Boddie v. Connecticut*, No. 265, though the opportunity exists for persons in appellants' marital circumstances to obtain a hearing for an adjudication of divorce, that opportunity is non-existent and unreal to persons who, like appellants, are unable to pay what amounts to an entrance fee.

Nor is the situation substantially different *vis-a-vis* due process in No. 81, *Simmons v. West Haven Housing Authority*, in which indigent defendants are deprived of their right to a hearing on appeal. For the appeal has become an "integral part" of our judicial system, *Griffin v. Illinois*, 351 U. S. 12 (1956), and "the proceedings in the appellate tribunal are to be regarded as a part of the process of law . . . and to be considered in determining any question of alleged deprivation of . . . life or liberty contrary to the Fourteenth Amendment." *Frank v. Mangum*, 237 U. S. 309, 327 (1914). In judging the quality of justice afforded by a particular state system, one must look to the entire course of proceedings in all its courts. *Id.* at 328.

Though the state need not provide any appellate review, when it does so it must afford that review to all commensurate with full constitutional guarantees. *Griffin v. Illinois*, 351 U. S. 12 (1956), *Burns v. Ohio*, 360 U. S. 252 (1959), *Smith v. Bennett*, 365 U. S. 708 (1961); *Lane v. Brown*, 372 U. S. 477 (1963). *Rinaldi v. Yeager*, 384 U. S. 305 (1966). Thus this Court has invalidated various states' attempts to eliminate appeals by indigents through sorting out processes which fall short of a fair judicial determination of the merits of the appeal. *Anders v. California*, 386 U. S. 738 (1967) (appointed counsel refused to prosecute an appeal he determined had no merit); *Lane v. Brown*, *supra* (only public defender could obtain a free transcript

on appeal, and he could refuse to do so for an appeal he deemed without merit); *Draper* v. *Washington*, 372 U. S. 487 (1963) and *Eskridge* v. *Washington State Board of Prison Terms and Paroles*, 357 U. S. 214 (1958) (trial judge could prevent appeals by indigents when he determined their objections to the trial to be without merit).

The requirement of a hearing attaches whenever important rights may be limited by the state. The power of the courts does not cease after trial; judicial mandate is equally powerful upon appeal, and so that mandate must, commensurate with due process, issue only upon opportunity to all for a full hearing.

B. *The Financial Requirements Challenged by Appellants Herein Are an Arbitrary and Unreasonable Restriction Upon the Judicial Process.*

There is a further dimension to the due process clause which requires administration of a judicial system in an even-handed manner, free from the arbitrary or capricious exercise of state power. *Jones* v. *Union Guano Co.*, 264 U. S. 171 (1924); *Ownbey* v. *Morgan*, 256 U. S. 94 (1921). In fact, the requirement of a hearing before adjudication of criminal or civil rights and liabilities is simply instrumental and subordinate to the underlying mandate of the Due Process Clause, that:

> "... no State can deprive particular persons, or classes of persons, of equal and impartial justice under law; that law in its regular course of administration through courts of justice is due process, and when secured by the law of the State the Constitutional requirement is satisfied; and that due process is so secured by laws operating on all alike, and not subjecting the individual

to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice." *Leeper* v. *Texas*, 139 U. S. 462, 468 (1890).

A judicial system which subjects litigants to different treatment based on financial means is indeed subjecting certain of those who come before it "to the arbitrary exercise of the powers of government." By denying to those who cannot afford a surety bond a chance to defend against eviction, at trial or on appeal, or denying the opportunity to file a petition for divorce to those unable to pay the necessary costs, a state is doling out justice on an arbitrary basis, for there is no rational justification in terms of the goals of a judicial system which can justify such distinctions.

This is not to say that all those guarantees which lie within the range of the Equal Protection Clause are simply a reiteration of what is meant by due process of law. It is simply to recognize a minimum requirement of equal justice that is imposed on state judicial systems. *Bolling* v. *Sharpe*, 347 U. S. 497, 499 (1954); *Giozza* v. *Tiernan*, 148 U. S. 657, 662 (1892); *Truax* v. *Corrigan*, 257 U. S. 312, 332 (1921):

"It may be that they [due process and equal protection] overlap, that a violation of one may involve at times the violation of the other, but the spheres of the protection they offer are not coterminous . . . The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously but upon

> inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. *Hurtado* v. *California*, 110 U. S. 516, 535. It, of course, tends to secure equality of law in the sense that it makes a required minimum of protection for everyone's right of life, liberty and property, which the Congress or the legislature may not withhold."

A system which makes determinations as to the merits of a claim before it, not on the basis of a factual situation, but on the basis of an arbitrary factor wholly external to the issues involved and the laws governing the rights of the parties—"the ability to pay costs," see *Griffin* v. *Illinois*, 351 U. S. 12, 17 (1956)—is not providing due process of law.

Nor can a legislature affect the outcome of legal proceedings by imposing irrational burdens upon one party to a lawsuit and not the other. To impose penalties for lack of success which intimidate and effectively deter a party from resorting to the courts, to gain a judgment or to appeal one, is the same as denying access to the courts entirely. *Missouri Pacific Ry. Co.* v. *Tucker*, 230 U. S. 340 (1913), and no process cannot be due process.

C. *Appellants Are Being Deprived of Rights Under the Due Process Clause.*

All the guarantees embodied in due process attach in the cases at bar because the appellants therein are being deprived of liberty and property by arbitrary processes of government.

Whether a leasehold is conceived of as real or personal property (see generally Powell, The Law of Real Property, Vol. 2, §221, pp. 177-188 (1967), the lessee's interest is a substantial property right. *Waskey* v. *Chambers*, 224 U. S. 564, 565 (1912); *Shelley* v. *Kraemer*, 334 U. S. 1, 10 (1948).

> "Except when he has divested himself of the right to possession, the lessee under a presently existing lease is the owner of a possessory estate and has all the rights which accompany ownership of such an interest. This is true with regard to the lessor as it is with regard to a third person."
>
> American Law of Property, Vol. 1, §3.38, p. 252 (1952).

As to the importance of the liberty to marry and divorce, these are fully examined in Point III, B, *infra*. See also *Williams* v. *North Carolina*, 325 U. S. 226, 230 (1944).

Nor can a state deprive a citizen of his right to prosecute or defend an action without due process.

> "[A] vested right of action is property in the same sense in which tangible things are property and is equally protected against arbitrary interference. Whether it springs from contract or from the principles of the common law, it is not competent for the legislature to take it away. A vested right to an existing defense is equally protected, saving only those which are based on informalities not affecting substantial rights, which do not touch the substance of the contract and are not based on equity and justice." *Pritchard* v. *Norton*, 106 U. S. 124, 132 (1882).

When a state affords the right to a divorce under certain conditions, it cannot deprive certain classes of persons of that right arbitrarily. For a right to a cause of action is protected by due process. *Forbes* v. *Board of Commissioners*, 258 U. S. 338 (1922), particularly when the action involves a subject as important to both the individual and society as marriage and divorce. *Loving* v. *Virginia*, 388 U. S. 1 (1967); *Maynard* v. *Hill*, 125 U. S. 190 (1888).

No less protected is the right to defend one's property against litigious attacks thereon. *Holt* v. *Virginia*, 381 U. S. 131 (1965); *Pritchard* v. *Norton*, *supra*. The state of Georgia could not enact a statute providing that the fact of payment is no defense to an eviction action based on alleged non-payment. Such a proposition is absurd. Yet this is exactly what Georgia and Connecticut have done by depriving the indigent tenant of a hearing in which he can present his defenses.

III.

Conditioning access to the Courts on posting bond or fees deprives appellants of freedom of expression and association and the right to petition the Government for redress of grievances in violation of the First and Fourteenth Amendments to the United States Constitution.

A. *Access to the Courts Is a Form of Expression and a Means of Petitioning the Government for Redress of Grievances Which Is Protected by the First Amendment.*

That the First and Fourteenth Amendments bar a state from imposing barriers to litigation is made clear by the series of cases decided by this Court involving attempts to inhibit litigation through restriction on members of the bar. The most definitive of these is *NAACP* v. *Button*, 371 U. S. 415 (1962)[3] in which the Court upheld the right of the NAACP to direct litigation and offer the services of and compensation to attorneys for litigating civil rights cases on behalf of Negroes in Virginia, against the state's accusation of barratry and solicitation of legal business.

Button first explicitly recognizes the importance of litigation as a source of political change.

> "In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression." 371 U. S. at 429.

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[3] See also *Brotherhood of Railway Trainmen* v. *Virginia*, 377 U. S. 1 (1964) and *United Mine Workers of America* v. *Illinois State Bar Association*, 389 U. S. 217 (1967).

Civil rights litigation is only the most prominent example of the use of the courts, particularly by minorities, whether racial or ideological, to gain a voice in governmental decision-making. Those with unpopular political beliefs (*Schenck* v. *United States*, 249 U. S. 47 (1919); *Greene* v. *McElroy*, 360 U. S. 474 (1959); *Baggett* v. *Bullett*, 377 U. S. 360 (1964)); or the esthetically unorthodox (*Jacobellis* v. *Ohio*, 378 U. S. 184 (1964); *Near* v. *Minnesota*, 283 U. S. 697 (1931); *Freedman* v. *Maryland*, 380 U. S. 51 (1965)); or adherents of minority religious sects (*Engel* v. *Vitale*, 370 U. S. 421 (1962); *Murdock* v. *Commonwealth of Pennsylvania*, 319 U. S. 105 (1943)); to name just a few, have sought through the judicial system to assert rights and gain protections which they were powerless to assert or enjoy through the ballot box or other means of influencing their government.

In recent years, the poor have with increasing frequency resorted to the courts to gain influence over those political processes from which they are otherwise cut off by the more affluent majority, with some success in their attempts to enforce existing law or to change that law. See, for example, *Shapiro* v. *Thompson*, *supra*; *King* v. *Smith*, 392 U. S. 309 (1968) (invalidating Alabama's refusal of welfare benefits to children whose mother resided with a man not her husband); *Williams* v. *Dandridge*, 297 F. Supp. 450 (D. Md. 1969) (invalidating maximum limit on Aid to Dependent Children grants regardless of family size and need). In other instances, the poor have successfully fought procedural limitations imposed by the judicial system which curtail their substantive rights, just as appellants herein seek to do. Thus exhaustion of administrative remedies has been held not to be required in a federal action under 42 U. S. C. §1938 (*Damico* v. *State of California*, 389 U. S. 416 (1967)). See also *Holmes* v. *New York City Housing*

Authority, 398 F. 2d 262 (2d Cir. 1968); a hearing commensurate with due process must be afforded persons terminated from public assistance (*Kelly* v. *Wyman,* 294 F. Supp. 887 (S. D. N. Y. 1968), probable jurisdiction noted, April 21, 1969, 37 U. S. L. W. 3399 (1969).

Pre-judgment garnishment, a process which greatly facilitated creditor interests and seriously injured poor debtors, was struck down by this Court, *Sniadach* v. *Family Finance Corp.,* —— U. S. ——, 89 S. Ct. 1820 (1969). In the field of landlord and tenant law, too, the poor have secured a measure of relief from arbitrary procedures. *Edwards* v. *Habib,* 397 F. 2d 687 (1968) invalidated retaliatory evictions and permitted a wholly new defense to be raised in summary eviction proceedings.[4] Also noteworthy are *Thorpe* v. *Durham Housing Authority,* 380 U. S. 670 (1967), —— U. S. ——, 37 U. S. L. W. 4068 (1969) dealing with the right to notice and a hearing before eviction from public housing; and various efforts to establish the doctrine of constructive eviction as a defense in actions for rent. *Reste Realty Corp.* v. *Jay M. Cooper* (N. J. Supreme Court No. A-45, March 17, 1969), *Pasqua* v. *DeMarchi* (N. Y. Sup. Ct. App. Div. 4th Dept. January 1969).

And see *Hackin* v. *Arizona,* 389 U. S. 143, 145 (1967) (Douglas dissenting). Cost requirements severely restrict the provision of legal services to the poor, because funds are simply unavailable to defray such expenses, as is indicated in the Appendix hereto.

The judicial system serves as a primary arbiter of disputes, both between private citizens and citizens and the

[4] The plaintiffs in *Edwards* were permitted to pay rent monthly into court, in lieu of a surety bond, in order to appeal an adverse trial court decision. The appeal resulted in the establishment of the doctrine of retaliatory evictions.

state. Men establish governments to provide order, and so governments must provide the mechanisms for the orderly and peaceful redress of grievances. It is precisely these mechanisms which the First Amendment is designed to make available to all citizens. To deny access to the courts to the poor is to relegate a class to the use of force to achieve its needs.

What is more, the fact that a suit may be nominally between private parties should be of no moment, for ostensibly private suits deeply implicate the state. Thus, in a matrimonial action, frequently the proceeding involves only one of the married parties and the state, the other spouse being beyond reach. The eviction proceedings herein challenged of course involve the state, which participated as landlord and evictor, so that one petitions the government for grievances perpetrated by it in the fullest sense. But even if this were not true, even if the landlord had been a private party, the right to petition the government for the redress of grievances would still obtain. It would be idle naivety to pretend that, in the middle of the twentieth century, a conflict between landlord and tenant is a purely private affair. That conflict, symptomatic of the schism between the privileged and the poor, is intimately bound up with state exertions. To deny the poor equal protection because eviction proceedings typically do not involve the government as landlord and so are private conflicts would be to ignore the widely perceived fact that the division between private and public is no longer so clear and to give credence to the charge of judicial complicity in the most oppressive form of establishmentarianism. Rather, it must be clearly held that rich and poor alike are entitled to petition the government for the redress of grievances and to obtain impartial justice.

Moreover, the status of litigation as protected activity is not mitigated when purely private causes of action are asserted. ". . . [T]he First Amendment does not protect speech and assembly only to the extent it can be characterized as political." *United Mine Workers of America* v. *Illinois State Bar Association,* 389 U. S. 217, 223 (1967). The right to petition the government includes the right to assert private demands which nevertheless depend for fulfillment on some form of government action, such as property rights or the right to a divorce when certain statutory requirements are met, just as the plaintiffs in the *Railroad Trainmen* and *United Mine Workers* cases were protected in their pursuit of benefits due them under various workmen's compensation laws.

B. *The Imposition of Costs for Divorce Proceedings Inhibits Appellants' Exercise of Their Freedom of Association and Right to Marry and Procreate.*

In addition to inhibiting their right to petition the government for the redress of grievances, costs imposed in divorce proceedings strike at the appellants' First Amendment right to associate in marriage and family, free from arbitrary interference by the state. Marriage and the family are associations protected against the Federal Government by the First and against the states by the Fourteenth Amendment. See, *inter alia, Skinner* v. *Oklahoma, supra, Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925); *Griswold* v. *Connecticut,* 381 U. S. 479 (1965).

Indeed, of the many associations protected by the First Amendment, the family is in some ways the most fundamental. It stands at the very core of that network of associations upon which our pluralist political structure is based. It has long been recognized that the protections of the First Amendment extend far beyond the simple politi-

cal assembly and embrace the whole range of associations forming this network, including schools, churches, and families as well as political parties. Indeed respect for the integrity of the family has long been one of hallmarks of American constitutional democracy, one of the critical factors distinguishing our form of government from totalitarian regimes.

The right to marry and have children is among the "basic civil rights of man . . . fundamental to the very existence and survival of the race." *Skinner* v. *Oklahoma,* 316 U. S. at 541. The state cannot be permitted to condition marital rights on the basis of invidious classifications. *Loving* v. *Virginia,* 388 U. S. 1 (1967); nor regulate in a discriminatory fashion matter traditionally left within the scope of the family association. *Pierce* v. *Society of Sisters, supra; Meyer* v. *Nebraska,* 262 U. S. 390 (1923); *Griswold* v. *Connecticut, supra.* Because of the state's historically intimate involvement in the preservation of the stability of the family as an institution, *Maynard* v. *Hill,* 125 U. S. 190 (1888), only the state can grant to appellants herein the freedom from an unsatisfactory and essentially fictional marriage, and the opportunity to enter into a new union. Plaintiffs have no remedy outside of court, and are prevented from ever entering into a marital association in the true sense, or from establishing a home and family in fulfillment of man's most basic instincts. Unable to afford the costs of a divorce, appellants are bound to a union that has for all purposes ceased to exist, a situation which in many cases is the cause of their indigence and public dependence in the first place. The state offers freedom from such a union, but only to those who can pay. Surely, this is not a reasonable regulation of the constitutionally protected freedom of association.

CONCLUSION

The Court should hold the financial requirements at issue in the three cases at bar violative of the Fourteenth Amendment in that they unlawfully discriminate against indigent persons and permit access to the courts and a judicial hearing only to those of financial ability. The decisions below should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

Publicly Funded Programs Providing Legal Services to the Poor Cannot Supply Bonds for Litigation Purposes

At the request of the Center for Social Welfare Policy and Law, Community Action for Legal Services undertook a survey to determine the experiences of the various legal services programs across the country with respect to requirements for posting bonds in civil cases brought on behalf of indigents. Pursuant to this undertaking, approximately thirty legal services programs, representing thirty states, were mailed a form letter and questionnaire (included within this appendix) requesting information in regards to the availability of legal services for the poor in situations requiring the posting of a bond. Insufficient time made it impossible for all but a few programs to respond. Precise statistical tabulation of these responses was impossible. The responses obtained, however, did outline the effects which the bond requirements posed to the successful operation of a legal services program.

Few of the programs actually posted bonds for litigation purposes. Partly, this is so because their programs decided to forego the suit because of the expenses and difficulties involved, and partly because some states have permitted waiver of the requirement. New York Civil Practice Law and Rule, §5519 (a) is illustrative on the latter point. To obtain, upon appeal, a stay of enforcement of a money judgment *without a court order,* the appellant is required to file an undertaking securing the judgment below. However, subsection (c) of Section 5519 allows a litigant an opportunity to obtain a stay by court order. Presumably this is without posting an undertaking, although the statute

is not very clear on this point. That waivers have not been possible in all such cases where states have similar provisions is confirmed by the enclosed statements from legal services attorneys that they have terminated hundreds of cases as a consequence of the bond requirement.

From this limited response, it was quite evident that legal services programs were unable to budget funds for the cost of procuring bonds. This result is in line with the experience in New York City. Funds from the Office of Economic Opportunity simply are not sufficient to pay for bonds. The money for bonds invariably comes from general litigation funds. The availability of money is a very acute problem for the legal services program. The OEO News Summary of the War on Poverty, dated July 15, 1969, states that:

> "Two hundred thirty one *Legal Services Programs* have been helped in fiscal 1968 at a Federal cost of $34,739,443." News Summary, p. 5.

Certainly, thirty five million dollars is a small figure to finance the entire cost of civil litigation for the poor of the nation. If New York City's experience is a guide to the general financial condition of other legal services programs in the country, and we believe that it is, then there is a rather straightforward way to account for the minute sums available for the costs of bonds.

Here as elsewhere, legal services programs are grossly understaffed and, as a direct result of the understaffing, are encountering a severe caseload problem. This strain on manpower increases the need for additional lawyers and clerical workers. In New York City, there are ten legal services programs, operating under Community Action for

Legal Services. Each of these programs has requested additional funds for increases in staff and staff salaries. The pressures on the programs, in terms of the strain of their budgets, can best be seen through the operation of Mobilization for Youth, one of the programs in New York. Mobilization for Youth, or MFY as it is popularly called, employs twenty-one attorneys. These 21 attorneys are responsible for providing legal services to the poor in an area extending from the lower east side of Manhattan, near East 3rd St., to the west side, near W. 102nd St. The use of 21 lawyers to cover such a vast area is conceivable only in a poverty program. Starting salaries for lawyers on the MFY staff are approximately $8600 as compared to starting salaries of $15,000-$18,000 for lawyers in Wall St. law firms. MFY has a proposed budget of $835,690 for 1969-1970, personnel costs, including salaries and fringe benefits, account for $665,025, or approximately 80% of the budget. In the past five months, ending on May, 1969, MFY reported an intake of 2,848 new cases, or an average of 136 new cases per attorney. Of this figure, 1,594 cases were closed or withdrawn, leaving 4,320 cases, or 206 cases per attorney, still pending.

These conditions are representative of the problems faced by legal services programs in the City and in the United States. To permit precious funds to be diverted away from the main goal of obtaining more attorneys in order to meet the costs of posting bonds would be a disservice to the poor who have come to rely upon the legal services attorney.

ALABAMA

Statement Concerning the Posting of Bonds for Stays, Appeals, Vacating of Judgments and Provisional Remedies

1. Amount of funds allocated to costs of bonds:

   The CAP Agency has a general fund for numerous purposes out of which they supply us bond money. However, we have no special fund designated specifically for bonds.

2. Amount expended for costs above:

   We have one case dealing with the double-rent bond and unlawful detainer suits and have bonded $624.00; we have appealed the same case on a $100.00 bond.

   In suits for preliminary injunctions, we have thus far spent $1500.00.

3. Short statement explaining why more funds are not budgeted for the cost of bonds:

   The Birmingham Legal Services Program was begun in January, 1969. At the time our budget was drawn, I assume that the necessity of bond money was not foreseen. However, let me clearly point out that the CAP Agency has been most generous with us. The money comes from them and not out of Legal Services budget.

4. Number of cases handled each month requiring a bond:

   In the last six (6) months, we have dealt with four cases requiring a bond.

5. Number of cases terminated because of inability to procure a bond: None.

6. Prepare a short affidavit stating (if true) that the necessity of posting bonds has prevented the giving of effective representation for the client.

7. Statement of situations requiring the posting of a bond in your state. (Attached)

A. Preliminary Injunctions; B. Appeal of unlawful detainer suits from General Sessions to Circuit Court; C. Detinue Suits in order to retain property; D. Appeal bonds in all appeal cases, in the amount guaranteeing the court costs accrued and the estimated court costs in the higher court, as well as guaranteeing the amount of judgment in the lower court.

(These are the only situations I am familiar with personally.)

LINDA S. LOMBARD
Legal Services Program Ensley Office
Birmingham, Alabama

AFFIDAVIT

It is most disturbing that a tenant can be evicted only five days after judgment is taken in an unlawful detainer suit. This procedure makes it most difficult to contest the filing of the double-rent bond when we wish to appeal the judgment to the Circuit Court. By the time I could get a hearing on a motion to suspend bond, or on a show-cause motion, the tenant would be out in the street.

It has thus far been impossible for me to contest the double-rent bond and the appeal bond required in unlawful detainer (eviction) cases, without detriment to my client.

Linda S. Lombard
Staff Attorney
Ensley Office
Legal Services Program

WITNESS: Virginia Hamilton

ARIZONA

STATEMENT CONCERNING THE POSTING OF BONDS FOR STAYS, APPEALS, VACATING OF JUDGMENTS AND PROVISIONAL REMEDIES

1. Amount of funds allocated to costs of bonds:

   None

2. Amount expended for costs above:

   None

3. Short statement explaining why more funds are not budgeted for the cost of bonds:

   No funds allocated under our federal grants for bonds.

4. Number of cases handled each month requiring a bond:

   Approximately 12 per month.

5. Number of cases terminated because of inability to procure a bond:

   Approximately 70 per year.

6. Prepare a short affidavit stating (if true) that the necessity of posting bonds has prevented the giving of effective representation for the client:

   It has in some cases. Affidavit attached.

7. Statement of situations requiring the posting of a bond in your state:

The situations most commonly affecting clients of the Maricopa County Legal Aid Society, Phoenix, Arizona, are, in the order of importance and frequency:

(1) Bond required to appeal a judgment from the Justice of the Peace Court to the Superior Court for trial de novo.

(2) Various appeal bonds.

Russell G. Sheley, Jr.
Maricopa County Legal Aid Society
Phoenix, Arizona

AFFIDAVIT

STATE OF ARIZONA,
COUNTY OF MARICOPA, *ss.*:

RUSSELL G. SHELEY, JR., Senior Staff Attorney, Maricopa County Legal Aid Society, Phoenix, Arizona, upon his oath deposes and says:

Based upon his personal experience, and upon information from other attorneys of this organization, which information he deems reliable, the necessity of posting bonds and the financial inability of a client to do so, sometimes prevents effective representation of the client.

RUSSELL G. SHELEY, JR.

SUBSCRIBED AND SWORN to before me this 2nd day of July, 1969.

Conception C. Padilla
Notary Public

My Commission Expires:

August 25, 1972

COLORADO

STATEMENT CONCERNING THE POSTING OF BONDS FOR STAYS, APPEALS, VACATING OF JUDGMENTS AND PROVISIONAL REMEDIES

1. Amount of funds allocated to costs of bonds:

Our office has no specific fund set aside for the cost of posting bonds. Our grant only allows a general litigation fund out of which we must provide for depositions, court costs when we cannot get through a motion to sue in forma pauperis (filing fees, jury fees, subpoena fees, etc.) and the client really cannot afford these costs.

2. Amount expended for costs above:

Only about $50, to $100. because cannot deplete the fund for the many other litigation costs which must be met.

3. Short statement explaining why more funds are not budgeted for the cost of bonds:

Very simply stated, the budget grants are not adequate.

4. Number of cases handled each month requiring a bond:

We cannot answer this question accurately. In the last month we have handled ten eviction cases by filing very elaborate pleadings. Upon the filing of our answers, the opposing parties have made offers which upon communication to our clients, the clients have found attractive and settled.

5. Number of cases terminated because of inability to procure a bond:

Again, this number is not ascertainable. If the bond requirement was not there, perhaps our clients would not find the settlement offers so attractive. Landlord-tenant law in Colorado is medieval in character. Our legislative efforts this year met much opposition and the bill was killed. Consequently judge-made law is the only avenue at present; but the cases slip from us because of the practical judgments our clients find it necessary to make.

6. Prepare a short affidavit stating (if true) that the necessity of posting bonds has prevented the giving of effective representation for the client.

7. Statement of situations requiring the posting of a bond in your state.

In Colorado "evictions" are commenced judicially pursuant to CRS (1963) 58-1-10. There is no posting of a bond pre-condition necessary for either party at trial. There are requirements of notice. CRS (1963) 58-1-7 described that notice in writing within fixed time periods according to the nature of the tenancy is necessary. This is for termination other than for non-payment of rent. Evictions for non-payment of rent are processed pursuant to CRS (1963) 58-1-8. Jurisdiction of the Courts is described in CRS (1963) 58-1-9, revision in Vol. 9 of CRS.

In Colorado, however, CRS (1963) 58-1-4 does provide that if either party requests a delay in trial longer than five days, it is within the discretion of the court upon good cause shown to require the posting of bond.

On appeal, CRS (L. 64) 58-1-18 requires the posting of a bond for all costs and damages which may accrue to the adverse party in order to stay proceedings on the judgment more than forty-eight hours. In addition, CRS (L. 64) 58-1-19 requires the defendant to deposit with the court the amount of rent found due and specified in the judgment in order to pursue his appeal.

AFFIDAVIT

STATE OF COLORADO,
CITY AND COUNTY OF DENVER, *ss.*:

TO WHOM IT MAY CONCERN:

I, RICHARD F. HENNESSEY, having been duly sworn, depose and say that:

1. I received a Doctor of Jurisprudence Degree from the Notre Dame Law School, University of Notre Dame, Notre Dame, Indiana, and thereafter received a Reginald Heber Smith Community Lawyer Fellowship from the University of Pennsylvania Law School for the purpose of study of the legal problems of the poor and engaging in legal services to the poor and disadvantaged.

2. I am a member of the Bar of the State of Colorado and have been an attorney for the Legal Aid Society of Metropolitan Denver, 1375 Delaware Street, Denver, Colorado 80204, for one year. During this time, I have been working solely with providing legal counsel and representation to persons who qualify for legal services and who are therefore, by definition, destitute.

3. In Colorado, C.R.S. (1963) 58-1-4 provides that if either party to a suit for unlawful possession of land requests a delay in trial longer than five days after the answer is due (which is five days after service of summons and complaint), it is within the discretion of the court upon good cause shown to require the posting of bond. On appeal, C.R.S. (L. '64) 58-1-18 requires the posting of a bond for all costs and damages which *may* accrue to the adverse party in order to stay proceedings on the judgment more than forty-eight hours. In addition, C.R.S. (L. '64) 58-1-19 requires the defendant to deposit with the court the amount of rent found due and specified in the judgment in order to pursue his appeal.

4. I have represented numerous persons, who, because of their poverty, were not able to plan for, in pursuing their judicial claims, the posting of bond in cases covered by the statutes mentioned in paragraph 3 above.

5. The Legal Aid Society of Metropolitan Denver does not have funds available for the posting of such bonds.

6. Due to these requirements of posting bond, I have not been able to give effective legal counsel and representation to my clients in diligently pursuing claims which are meritorious and just.

RICHARD F. HENNESSEY

Subscribed and sworn to before me this 26th day of June, 1969.

Merlyn H. Kinchelow
Notary Public

My commission expires
November 17, 1971

INDIANA

STATEMENT CONCERNING THE POSTING OF BONDS FOR STAYS, APPEALS, VACATING OF JUDGMENTS AND PROVISIONAL REMEDIES

1. Amount of funds allocated to costs of bonds:

Approximately $500.00 is allocated for litigation expenses of which bonds are included.

2. Amount expended for costs above:

Approximately $100.00 per year.

3. Short statement explaining why more funds are not budgeted for the cost of bonds:

More funds are not budgeted for the cost of bonds because the O.E.O. has not increased our budget to allow for litigation cost.

4. Number of cases handled each month requiring a bond:

Approximately 15 cases each month require a bond.

5. Number of cases terminated because of inability to procure a bond:

Almost every case that requires a bond is terminated due to the inability to procure a bond.

6. Prepare a short affidavit stating (if true) that the necessity of posting bonds has prevented the giving of effective representation for the client.

7. Statement of situations requiring the posting of a bond in your state:

Briefly they are as follows:

a. In an eviction action, if the plaintiff files an affidavit for immediate possession and a writ for possession the defendant is required to post a bond under Burns Indiana Statutes Annotated 3-1306. The tenant failing to post a bond will be evicted.

b. A bond is required before a court enters a temporary restraining order on temporary injunction pursuant to Burns Indiana Statute 3-2107.

c. A bond is not required to file an appeal, however, a bond is required in order to stay the enforcement of any judgment or interlocutory order, Supreme Court Rule 2-3.

All of the above bonds are required and if a waiver is not granted under the statute or rules of the Indiana Supreme Court.

AFFIDAVIT

STATE OF INDIANA)
COUNTY OF LAKE)

I, J. ROBERT MIERTSCHIN, JR., first being duly sworn under oath depose and say:

1. That I am an attorney for the Legal Aid Society of Gary, Inc., Gary, Indiana.

2. That the requirements of posting bonds has been a detriment to our clients.

3. That Legal Aid cliental do not have the funds to provide for a bond and are thereby prohibited effective representation and immediate relief.

Affiant, verily believes that the foregoing is true and accurate to the best of his knowledge.

J. Robert Miertschin, Jr.
Legal Aid Society of Gary, Inc.
738 Broadway, Gary, Indiana

Subscribed and sworn to before this ..... day of July, 1969.

Nancy Marie McQuen
Notary Public

My Commission Expires:

August 22, 1972

IOWA

Statement Concerning the Posting of Bonds for Stays, Appeals, Vacating of Judgments and Provisional Remedies

1. Amount of funds allocated to costs of bonds:

   $2,000 lump sum for all litigation costs.

2. Amount expended for costs above:

   100%.

3. Short statement explaining why more funds are not budgeted for the cost of bonds:

   Total budget is too small to increase this cost.

4. Number of cases handled each month requiring a bond:

   6-7 per year.

5. Number of cases terminated because of inability to procure a bond:

   We have no figures on this, would guess several per year.

6. Prepare a short affidavit stating (if true) that the necessity of posting bonds has prevented the giving of effective representation for the client:

   No Affidavit.

7. Statement of situations requiring the posting of a bond in your state:

   Replevin; Appeal from Summary Eviction.

Duane E. Woodworth, Director
Black Hawk County Legal Aid Society
Waterloo, Iowa

LOUISIANA

Statement Concerning the Posting of Bonds for Stays, Appeals, Vacating of Judgments and Provisional Remedies

1. Amount of funds allocated to costs of bonds:

   $5,000 for court costs. There is no breakdown of types of court costs, such as bankruptcy fees, divorce fees, etc.

2. Amount expended for costs above:

   None

3. Short statement explaining why more funds are not budgeted for the cost of bonds:

   O.E.O. restrictions and needs in other areas for more funds.

4. Number of cases handled each month requiring a bond:

   None

5. Number of cases terminated because of inability to procure a bond:

   Unknown—neighborhood attorneys take position that procedures on appeal, particularly bond requirements, are so onerous that appeals are, as a practical matter, nonexistent.

6. Prepare a short affidavit stating (if true) that the necessity of posting bonds has prevented the giving of effective representation for the client:

   See attached.

7. Statement of situations requiring the posting of a bond in your state:

See attached memorandum. Memorandum is written as an advocate's presentation. The arguments put forth have never been successfully raised in Louisiana.

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, a Notary, appeared the undersigned, JEFFREY B. SCHWARTZ, who declared under oath that:

1. I am a staff attorney with the New Orleans Legal Assistance Corporation, an OEO-funded legal services office rendering free legal advice and services to the poor.

2. The New Orleans Legal Assistance Corporation (NOLAC) has five neighborhood offices and one main office with a complement of nine full time attorneys.

3. NOLAC accepts on the average about sixty or seventy cases a year involving evictions by a landlord of a tenant-client.

4. Although the records of NOLAC do not reveal how many of these cases were actually defended by NOLAC attorneys in summary state eviction proceedings, personal familiarity with these cases leads to an estimate that a large portion of the sixty or seventy cases did involve attempted defenses, a high proportion being unsuccessful, in state court.

5. NOLAC attorneys have *never* appealed a judgment of eviction by the City Court.

6. The reason for failure to appeal in any case, even though in some instances the attorney does believe that there is cause for a reversal of the lower court decision of eviction, is the onerous requirements for taking an appeal.

7. Primary among these onerous requirements for the indigent clients of NOLAC is the requirement that the tenant-appellant post security in sufficient amount to protect the landlord against all damages the landlord may sustain as a result of the appeal. LSA-C.C.P. Art. 4735. Being indigent, NOLAC's clients are unable to post the security for damage and consequently, are effectively prohibited from appealing a decision of eviction.

JEFFREY B. SCHWARTZ
New Orleans Legal Assistance Corp.
605 Carondelet Building
New Orleans, Louisiana

Sworn to and subscribed before me
this 23rd day of July 1969.

EARL J. AMEDEE
Notary Public

NEW ORLEANS LEGAL ASSISTANCE
CORPORATION
605 CARONDELET BUILDING
NEW ORLEANS, LA. 70130

MEMORANDUM

Reform in the area of landlord-tenant relations is going to require defense at the trial level and appeals if necessary. In the event of an order to vacate, the initial concern must be to maintain the client in possession. Once the tenant vacates the premises, the question of his *right* to possession of the premises becomes moot. (Of course, the client's leaving the premises does not affect any affirmative actions for damages such as a suit in tort.)

In an eviction suit, the procedures to obtain a suspensive appeal are onerous and must be carefully complied with. LSA-C.C.P. Art. 4735. The necessary procedures are:

1. A sworn answer by the defendant to the rule;

2. The pleading in the answer of an affirmative defense entitling defendant to retain possession of the premises; and

3. Within 24 hours after the rendition of the judgment of eviction,

   (a) Apply for the appeal

   (b) File appeal bonds.

Although cumbersome and sticky, the only one of these requirements that presents a substantial burden, is the furnishing of an appeal bond. Article 4735 provides,

> "The amount of the suspensive appeal bond shall be determined by the court in an amount sufficient to protect the appellee against all such damages as he may sustain as a result of the appeal."

The possible damages sustainable as a result of the appeal are as follows:

1. Loss of use of premises from date of judgment by trial court until date of final appellate judgment by the appellate court.

2. Cost of the appeal.

Considering the second point as to the cost of appeal first, it is clear that a person entitled to proceed in forma pauperis under Article 5185 is entitled to a devolutive appeal and to apply for supervisory writs without cost. LSA-C.C.P. 5185. Article 5185 goes on to state, however, that such an indigent

> "is not entitled to a suspensive appeal, or to an order or judgment required by law to be conditioned on his furnishing security other than for costs, unless he furnishes the necessary security therefor."

The case law makes it clear that the portion of a bond relating to the costs of the appeal as opposed to security for damages is not required of an indigent. See comment (f) to Article 2124 and cases cited therein. Thus, our clients do not have to file bond to cover the costs of an appeal.

The remaining point as to a bond for damages suffered during the pendency of the appeal is more difficult to deal with. Article 2124 states the security be furnished for an appeal. The security to be furnished for a suspensive appeal is as follows:

"(1) * * *;

(2) when the judgment distributes a fund in custodia legis, only security sufficient to secure the payment of costs is required; and

(3) in all other cases, the security shall be fixed by the trial court at an amount sufficient to assure the satisfaction of the judgment, together with damages for the delay resulting from the suspension of the execution."

Since the judgment is possession of the premises, there appears to be no danger that if the appeal is unsuccessful, the premises will not be delivered. The only damage, therefore, is due to the delay. This will probably be measured by the monthly rent being paid, though allegations of additional damage might be encountered.

The most desirable procedure from our client's point of view, if this becomes the ultimate issue in controversy as to the appeal bond, is to pay the monthly rental periodically into court as it accrues. This arrangement has the advantage of leverage on the lessor to appeal and to pursue the matter without delay yet still affords him opportunity to seek dissolution of suspensive appeal should lessee fail to pay. The order for a suspensive appeal could be so framed.

It should be noted in making the argument that periodic payment in court of the accrued rent is sufficient, that comment (c) to Article 2124 states that,

"Subparagraph 3 . . . is taken in principal from Fed. Rule 73(d). It is flexible in that it gives the court a wide discretion in fixing the bond in cases not involving a money judgment."

Another argument, that is appealing to me, (for saying) that no suspensive appeal bond is appropriate is that the periodic payment of the accrued rent into court constitutes, under subparagraph 2 above, a custodia legis. Therefore, under the prevailing law no appeal bond for damages is necessary. See paragraph (f) of comments to Article 2124.

It should be argued, that the requirement of any appeal bond beyond the periodic payment into court of the accrued rent is in violation of both State Constitution, Article I, §§2&6, (due process and open access) and the United States Constitution, the Equal Protection Clause provision of the Fourteenth Amendment because the security effectively bars indigents from appealing. *Griffin* v. *Illinois; Williams* v. *Shaffer* (Douglas dissenting).

MAINE

Statement Concerning the Posting of Bonds for Stays, Appeals, Vacating of Judgments and Provisional Remedies

Pine Tree Legal Assistance, Inc. has no specific moneys allocated for the cost of bonds but pays for those few bonds which we do file from our general court cost fund. As far as I know we have handled very few cases requiring the posting of a bond and have terminated none because of inability to procure a bond.

Me. Rev. Stat. Ann. tit. 14, §1903 (1964) requires the posting of a bond upon an appeal taken from the District Court if the appellee so requests. However, there is no bond required for appeal to the Law Court, the highest court in Maine, from the Superior Court which is the higher of the two trial courts in the State. Me. R. Civ.

P. 62 c. However, the civil rule for the issuance for a restraining order or preliminary injunction requires the giving of security by the applicant therefore. Me. R. Civ. P. 65 c.

I hope this will be sufficient for your purposes, and we are, of course, hoping that there will be a favorable decision in the Simmons case. It would be much appreciated if you could forward to us a copy of the amicus brief which you will file in that case.

July 8, 1969

Robert Edmont Mittel
Director Test Case Unit
Pine Tree Legal Assistance, Inc.
Portland, Maine

MICHIGAN

Statement Concerning the Posting of Bonds for Stays, Appeals, Vacating of Judgments and Provisional Remedies

1. Amount of funds allocated to costs of bonds:

   None

2. Amount expended for costs above:

   None

3. Short statement explaining why more funds are not budgeted for the cost of bonds:

   No provision in our funding for bonds.

4. Number of cases handled each month requiring a bond:

   15

5. Number of cases terminated because of inability to procure a bond:

   35 to date this year.

6. Prepare a short affidavit stating (if true) that the necessity of posting bonds has prevented the giving of effective representation for the client:

   See attached.

7. Statement of situations requiring the posting of a bond in your state:

   All of the 35 cases dropped before appeal for lack of bond were appeals from landlord-tenant court, where waiver was requested and denied, and offers to pay current rentals were refused as bond. Michigan law formerly required the posting of 9 months rent as bond on *appeal*. New statute effective October, 1968 changed that requirement to reasonable bond. M.S.A. §27A.5670 Landlord-tenant division judges have consistently construed this to require a cash deposit in the amount of the judgment below or more in spite of Common Pleas instructions reiterating the statutory language. Circuit court judges usually on appeal will accept paying of current rentals into court as proper bond.

INHIBITION ON JURY TRIAL

In Revised Rules of the Common Pleas Court of Detroit, Landlord-Tenant Division, effective May 15, 1969,

a tenant must pay current rentals into escrow if he demands a jury trial and if said trial cannot be held "forthwith." Rule 7. This court-rule imposed escrow provision operates as a bond to secure the landlord's claim for rent before a tenant may obtain a jury trial. In spite of Common Pleas instructions to the contrary, Landlord-Tenant Division judges construe "current" rentals to be all rent claimed.

AFFIDAVIT

STATE OF MICHIGAN)
) ss
COUNTY OF WAYNE)

MAX L. HARDEMAN, being duly sworn deposes and says that for the past year he has served as rent strike Co-ordinator for Neighborhood Legal Services in Detroit, *Michigan.*

Deponent says further that there is a bond requirement for appealing judgments from our local "eviction court" (Landlord-Tenant Court).

Deponent says further that even when the bond requirement has been met that clerks of the "Local eviction court" have refused to file the bond.

Deponent says further that the bond may be satisfied by securing sureties. That when personal sureties are obtained it is necessary for them to take an oath before a judge of that Court. That deponent has been informed and believes that the judges of that Court have refused to administer said oath when personal sureties have appeared before them and requested it.

Deponent says further that many of these defendants receive no notice of the Court proceedings until they are over.

Depohent says further that the necessity for posting bonds coupled with the lack of notice of the Court proceedings prevents many defendants from ever having a day in Court.

Further deponent saith not.

MAX L. HARDEMAN

Dated: July 25, 1969

Subscribed and sworn to before me
this 25th day of July, 1969.

LORAL D. VIGLIOTTI, Notary Public
County of Wayne, State of Michigan
My Commission Expires: Dec. 9, 1972

MISSISSIPPI

Statement Concerning the Posting of Bonds for Stays, Appeals, Vacating of Judgments and Provisional Remedies

Few of our clients pay rent, and evictions in rural areas are not frequent; so it is hard to draw any conclusions.

M. B. Trister
North Mississippi Rural Legal Services
Oxford, Mississippi

NORTH CAROLINA

Statement Concerning the Posting of Bonds for Stays, Appeals, Vacating of Judgments and Provisional Remedies

Letter July 4, 1969:

In answer to your letter of June 19, 1969, we regret to report that our Housing Division, as such, is only a few weeks old and we have done no trial work in this area as of this time. However, we are working on such a case and obtained a brief used by the Legal Aid office in Charlotte, North Carolina, to further our efforts. I thought you might be interested in seeing the part of the brief dealing with the constitutionality of our bond statute, NCGS §42-34. If someone could benefit from this, please pass it along.

In order to appeal from a summary ejectment, NCGS requires that:

> "... but no execution commanding the removal of a defendant from the possession of the demised premises shall be suspended until the defendant gives an under-

taking in an amount not less than one year's rent of the premises, with sufficient surety, who shall justify and be approved by the justice, to be void if the defendant pays any judgment which in that or any other action the plaintiff may recover for rent, and for damages for the detention of the land."

At present this statute is still valid as it has not gone to the North Carolina Supreme Court. There was no appeal in the *Lessie Mae Tucker* v. *Bumgardner* case.

I hope this information will be of some value to you.

Bill Marshall
Housing Division
The Legal Aid Society of Forsyth County
Winston-Salem, North Carolina

TEXAS

STATEMENT CONCERNING THE POSTING OF BONDS FOR STAYS, APPEALS, VACATING OF JUDGMENTS AND PROVISIONAL REMEDIES

1. Amount of funds allocated to costs of bonds:

   None.

2. Amount expended for costs above:

   N/A

3. Short statement explaining why more funds are not budgeted for the costs of bonds:

   N/A

4. Number of cases handled each month requiring a bond:

   One or two.

5. Number of cases terminated because of inability to procure a bond:

   None.

6. Prepare a short affidavit stating (if true) that the necessity of posting bonds has prevented the giving of effective representation for the client:

   N/A

7. Statement of situations requiring the posting of a bond in your state.

   Can usually be waived if it is a problem.

Frank P. Christian, Director
Bexar County Legal Aid Association
San Antonio, Texas